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In The

Supreme Court of the United States

JAIME DURAN FLORES,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Fifth Circuit

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

Petitioner is indigent and Hispanic. At his trial, the Government used its peremptory challenges to strike all three Hispanic panel members who mathematically could have been empanelled, though they said nothing that could provide a race-neutral basis for doing so. Appointed counsel did not object to this obvious *Batson* violation. Did appointed counsel's failure to object waive petitioner's *Batson* claim, or was it a forfeiture so that the *Batson* issue is reviewable under the plain error standard?

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PETITION FOR A WRIT OF CERTIORARI

Petitioner Jaime Duran Flores respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Fifth Circuit in this case.

OPINIONS BELOW

The unpublished opinion of the United States Court of Appeals for the Fifth Circuit affirming the petitioner's conviction is reported at *United States v. Flores*, 286 Fed. Appx. 206 (5th Cir. 2008) (2008 WL 3244071), and appears at Appendix pages ("App. at ___") 1-19.

JURISDICTION

On August 7, 2008, the Fifth Circuit filed its opinion affirming petitioner's conviction. App. at 1-19. On September 9, 2008, the Fifth Circuit denied petitioner's timely petition for rehearing. App. at 21-22. This Court has jurisdiction pursuant to 28 U.S.C. § 1254(1).

CONSTITUTIONAL PROVISION AND RULE OF PROCEDURE AT ISSUE

The Equal Protection Clause of Section 1 of the Fourteenth Amendment to the United States Constitution provides:

> No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

Federal Rule of Criminal Procedure 52(b) states:

> Plain Error. A plain error that affects substantial rights may be considered even though it was not brought to the court's attention.

STATEMENT OF THE CASE

Mr. Flores was convicted of being a felon in possession of a firearm, the predicate felonies having been pleaded to more than ten years prior. He claimed innocence at trial, but challenges only one issue here: the Government's conduct during voir dire.

In the seminal *Batson* decision, this Court extended the Fourteenth Amendment's protections to voir dire, holding that prosecutors cannot use peremptory challenges to strike jurors based on race or

national origin. *Batson v. Kentucky*, 476 U.S. 79 (1986). Here, the Government used its peremptory challenges to strike all panel members with Hispanic surnames who had a mathematical chance of being empanelled. Those panel members said nothing during voir dire, and nothing is contained in the juror identification roster, that differentiated them from non-Hispanic jurors. App. at 23-35.

Mr. Flores's appointed counsel did not object, and on that basis the Fifth Circuit held that Mr. Flores had waived his *Batson* claim. App. at 7-8. In so holding, the Fifth Circuit overturned its own recent precedent finding that a *Batson*-type challenge could be raised on appeal under the plain error standard of Federal Rule of Criminal Procedure 52(b). (App. at 7-8 n.4).

REASONS FOR GRANTING THE WRIT

Certiorari should be granted for three reasons.

First, the Fifth Circuit's holding that petitioner's *Batson* claim could not be raised on appeal conflicts with the Fifth Circuit's own precedent (which it then overturned in favor of older precedent) as well as the precedent of seven circuit courts (the First, Second, Third, Seventh, Eight, Ninth, and Tenth). Those circuit courts have all found that counsel's failure to object constitutes a forfeiture rather than a waiver, and thus the *Batson* issue can be reviewed under the plain error standard of Rule 52(b). In contrast, three

circuit courts (the Fourth, Sixth, and Eleventh) appear to follow the Fifth Circuit's holding and have found that counsel's failure to object constitutes an unreviewable waiver. A defendant's ability to appeal his conviction should not hinge on geographic happenstance. Accordingly, certiorari should be granted to resolve this split in authority.

Second, Mr. Flores can prevail under the plain error standard. The Government's use of its peremptory challenges to strike all panel members with Hispanic surnames who had a chance of being empanelled is a clear violation of *Batson*. That error affected a substantial right: there is no more fundamental protection to a criminal defendant than the right to a fair jury trial, and a violation of *Batson* impinges on that protection *per se*. Additionally, certiorari is warranted to resolve an apparent split in authority regarding whether demonstrating that a panel member has a Hispanic surname is sufficient to meet the second prong of a *Batson* challenge – an issue critical to determining whether a Hispanic defendant could ever prevail under the plain error (or any other) standard.

Third, this is an important question of law likely to be encountered again. That this Court continues to find *Batson* violations demonstrates that prosecutors continue to exclude minority panel members without race-neutral bases. As a percentage of the population, minorities are disproportionately the subject of criminal prosecutions, indigent, and represented by appointed counsel. As well, the population of this

country is increasingly "minority," especially Hispanic. Indigent minority defendants are exactly those who should be protected by *Batson*, but who, like Mr. Flores, are likely to be subject to the improper use of peremptory challenges. The Fourteenth Amendment and *Batson* will be of little use to minority defendants if their appointed counsel's failure to enforce those rights constitutes a waiver that cannot be reviewed under Rule 52(b). Certiorari is warranted to resolve these issues not just for Mr. Flores, but for all minority defendants and panel members.

I. THE GOVERNMENT STRUCK ALL PANEL MEMBERS WITH HISPANIC SURNAMES WHO COULD HAVE BEEN EMPANELLED

Mr. Flores is Hispanic.[1] There were 44 panel members, numbered 1 through 44, and the 12 with the lowest numbers after strikes would be empanelled.

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[1] He was identified as such in court documents, and Flores is the 13th most frequently occurring Hispanic surname. *See* David L. Word & R. Colby Perkins Jr., *Building a Spanish Surname List for the 1990s – A New Approach to an Old Problem*, POPULATION DIV. WORKING PAPER SERIES, Technical Working Paper No. 13 (Population Div., U.S. Bureau of the Census, Washington, D.C.) (March 1996), at 20, available at http://www.census.biz/population/documentation/twpno13.pdf (ranking 639 "most frequently occurring heavily Hispanic surnames"). This Court has previously relied on Census Bureau statistics to demonstrate that a surname was Hispanic. *See Castaneda v. Partida*, 430 U.S. 482, 486, 486 n.5 (1977).

App. at 23-35, 37. The Government struck seven jurors via peremptory challenges following a voir dire during which it asked no questions. App. at 36. Of the seven struck by the Government, three had definitive Hispanic surnames: Mondragon (#6), Zarate (#22), and Urias (#28). App. at 36.[2] These were the first three jurors with Hispanic surnames, and the next (Gomez – #33) had no mathematical chance of being empanelled. App. at 32. Assuming the Government had used all of its peremptory challenges but not on the Hispanic panel members, Mondragon, Zarate, and Urias all would have been in the top 12. App. at 23-37. The population of Midland County, where Mr. Flores was convicted, is over one-third Hispanic.[3] No panel member with a Hispanic surname sat on the jury that ultimately convicted Mr. Flores. App. at 37.

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[2] *See* Word, supra n.1, at 21, wherein Mondragon, Urias, and Zarate also appear in the list of the "most frequently occurring heavily Hispanic surnames."

[3] *See* U.S. Census Bureau: State and County QuickFacts, http://www.quickfacts.census.gov/qfd/states/48/48329.html (stating that in 2006, "Persons of Hispanic or Latino origin" comprised 34.9 percent of the population of Midland County, Texas).

II. CIRCUIT COURTS ARE SPLIT ON WHETHER DEFENDANTS MAY BRING A *BATSON* CHALLENGE ON APPEAL UNDER RULE 52(B), WITH THE MAJORITY FINDING, CONTRARY TO THE FIFTH CIRCUIT, THAT THEY MAY

Seven Circuit Courts (the First, Second, Third, Seventh, Eight, Ninth, and Tenth) have held that a *Batson* challenge can be raised for the first time on appeal under the plain error standard. *See United States v. Willis*, 523 F.3d 762, 767 (7th Cir. 2008); *United States v. Brown*, 352 F.3d 654, 663 (2d Cir. 2003) ("A majority of other circuits, however, review untimely *Batson* objections for plain error"); *Hidalgo v. Fagen*, 206 F.3d 1013, 1019-20 (10th Cir. 2000); *United States v. Contreras-Contreras*, 83 F.3d 1103, 1105 (9th Cir. 1996); *United States v. Chandler*, 12 F.3d 1427, 1432 (7th Cir. 1994); *United States v. Pulgarin*, 955 F.2d 1, 2 (1st Cir. 1992); *United States v. Bedonie*, 913 F.2d 782, 794 (10th Cir. 1990); *United States v. Dobynes*, 905 F.2d 1192, 1197 (8th Cir. 1990); *Gov't of Virgin Islands v. Forte*, 806 F.2d 73, 76 (3d Cir. 1986). Indeed, in the Second Circuit's *Brown* decision, the Government *agreed* that the plain error standard applied to untimely *Batson* claims. *See Brown*, 352 F.3d at 663 ("The government agrees that plain error review is proper here, thereby relinquishing the argument that Brown has waived, as opposed to forfeited, her objection.").

These circuit courts all found that the failure of trial counsel to object constituted a forfeiture rather than a waiver, and accordingly an untimely *Batson* challenge was reviewable under Rule 52(b). Indeed, the Fifth Circuit previously had also so held when reviewing a gender-based challenge brought for the first time on appeal. *See United States v. Parsee*, 178 F.3d 374, 378 (5th Cir. 1999) ("For the first time on appeal, appellants urge that the government impermissibly excluded a juror on the basis of her gender. . . . We may now reverse only if plain error was committed[.]"). The Fifth Circuit overturned *Parsee* in its opinion below. *See* App. at 7-8 n.4.

In contrast, three other circuit courts (the Fourth, Sixth, and Eleventh) appear to follow the Fifth Circuit's holding below that a *Batson* challenge is not reviewable under Rule 52(b). *See Anderson v. Fed. Express Corp.*, No. 96-6723, 145 F.3d 1329, 1998 WL 246456, at *1 (6th Cir. May 5, 1998); *Morning v. Zapata Protein (USA), Inc.*, 128 F.3d 213, 216 (4th Cir. 1997); *United States v. Cashwell*, 950 F.2d 699, 704 (11th Cir. 1992). Accordingly, the circuit courts are split (as is the Government) on the question presented.[4]

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[4] State courts also have split on this important constitutional issue. At least five allow appellate review under a standard equivalent or similar to Rule 52(b). *See, e.g.*, *State v. Were*, 890 N.E.2d 263, 278-79 (Ohio 2008); *McGee v. State*, 953 So.2d 211, 214 (Miss. 2007); *State v. Nordlund*, No. 26859-1-II, 2002 WL 31081997, at *3 n.9 (Wash. Ct. App. Sept. 13, 2002);

(Continued on following page)

III. MR. FLORES CAN MEET THE REQUIREMENTS OF RULE 52(B), AS COULD OTHER MINORITY DEFENDANTS UNDER SIMILAR FACTS

As this Court observed in *United States v. Frady*, Rule 52(b) "reflects a careful balancing of our need to encourage all trial participants to seek a fair and accurate trial the first time around against our insistence that obvious injustice be promptly addressed." *United States v. Frady*, 456 U.S. 152, 163 (1982). Based on those two competing interests, this Court said that the Rule was "intended to afford a means for the prompt redress of miscarriages of justice." *Id.* Given the opportunity, Mr. Flores could satisfy the three-prong test for meeting Rule 52(b): (A) there was plain error, (B) regarding a substantial right, (C) that affected the fairness, integrity or public reputation of judicial proceedings. *United States v. Vonn*, 535 U.S. 55, 58, 62-63 (2002).

Rodriguez v. Weber, 617 N.W.2d 132, 141 (S.D. 2000); *Hurts v. Woodis*, 676 So.2d 1166, 1172 (La. Ct. App. 1996). In contrast, at least five have found that the failure to object results in waiver. *See, e.g., Strong v. State*, 263 S.W.3d 636, 646-47 (Mo. 2008); *People v. Rivera*, 810 N.E.2d 129, 136 (Ill. App. Ct. 2004); *State v. Ford*, 39 P.3d 108, 112 (Mont. 2001); *Richardson v. McGriff*, 762 A.2d 48, 63-64 (Md. 2000); *Allen v. State*, 726 S.W.2d 636, 640 (Tex. App. 1987).

A. The exclusion of Hispanic panel members was plain error.

Batson created a three-part test for challenging race-based peremptory challenges: (1) the defendant is a member of a cognizable racial group, (2) the Government exercised peremptory challenges to remove from the jury pool members of the defendant's race, and (3) the existence of such facts and any other relevant circumstances to raise an inference that peremptory challenges were used to exclude panel members based on race. *Snyder v. Louisiana*, 128 S. Ct. 1203, 1207 (2008).

First, Census Bureau data demonstrates that Mr. Flores has a definitive Hispanic surname. *See supra* at 5 n.1. Hispanics are considered a cognizable racial group. *See, e.g., Hernandez v. New York*, 500 U.S. 352, 358 (1991); *Castenada*, 430 U.S. at 497 ("[P]ersons with Spanish surnames are readily identifiable.").

Second, the Government exercised its peremptory challenges to strike all three panel members with Hispanic surnames who had a mathematical chance of being empanelled, guaranteeing that no panel members with Hispanic surnames would be seated. *See* App. at 36-37.

Third, the full record will show that the Government asked no questions during voir dire, and there were no answers given to the trial court's questions that would have elicited race-neutral bases for the strikes. The Hispanic and non-Hispanic panel members answered questions during voir dire – which was

comprised of only four questions – consistently: some but not all had previously sat on a jury, some but not all owned firearms, some but not all had worked for the government, and none had any issue with the Midland Police Department. Based on these responses, there were no possible race-neutral bases for striking the Hispanic jurors. *See Snyder*, 128 S. Ct. at 1209-12 (rejecting proffered race-neutral justification where minority panel member's "suspect answer" was also given by non-minority panel members who were not struck); *Miller-El v. Dretke*, 545 U.S. 231, 241 (2005) (rejecting proffered race-neutral justifications where minority and non-minority panel members answered questions consistently but 91% of African American panel members were struck). Accordingly, Mr. Flores can demonstrate a pattern of discrimination evidencing a strong inference of the use of peremptory challenges based on race.

Under these circumstances, the Government could not possibly proffer race-neutral bases for striking all panel members with Hispanic surnames with a chance of being empanelled. And any attempt to articulate non-verbal, race-neutral bases for striking all of the panel members of the defendant's same race would be rejected as a matter of law. *See Purkett v. Elem*, 514 U.S. 765, 768 (1995) ("[I]mplausible or fantastic justifications may (and probably will) be found to be pretexts for purposeful discrimination."); *Montiel v. City of Los Angeles*, 2 F.3d 335, 340 (9th Cir. 1993) (calling counsel's responses "suspect and pretextual, particularly because all jurors

with Spanish surnames were peremptorily struck from the panel").

Of note, on the appeal below the Government never proffered race-neutral explanations, but rather relied on two arguments: (a) that any *Batson* claim had been waived, and (b) that having a Hispanic surname was not enough to be included as a member of a cognizable racial group.

As to the former, that is the subject of this appeal. As to the latter, this Court and at least two circuit courts have predicated a *Batson* violation based on the exclusion of jurors with "Hispanic surnames." *See Hernandez*, 500 U.S. at 358 (agreeing with lower court's finding that the striking of "the only three prospective jurors with definitive Hispanic surnames . . . made out a prima facie showing of discrimination"); *Castaneda*, 430 U.S. at 495 ("[T]he selection procedure is not racially neutral with respect to Mexican-Americans; Spanish surnames are just as easily identifiable as race was from the questionnaires in Alexander or the notations and card colors in Whitus v. Georgia. . . ."); *Montiel*, 2 F.3d at 340 (discrimination "appear[ed] evident from the defendants' use of five of their seven peremptory challenges to excuse all three prospective jurors with Spanish surnames and two of the three African-Americans"); *United States v. Hernandez-Rodriguez*, No. 93-8142, 16 F.3d 1216, 1994 WL 57674, at *2 (5th Cir. Feb. 17, 1994) (per curiam) ("*Batson* recognized that 'a 'pattern' of strikes against [minority] jurors included in that particular venire might give rise to

an inference of discrimination.' . . . In the instant case, such a pattern existed; every peremptory strike available to the prosecutor was used to exclude jurors with Hispanic surnames.") (quoting *Batson*, 476 U.S. at 97).

In contrast, at least two circuit courts have held that Hispanic surnames cannot serve as a proxy for "actually" being Hispanic. *See United States v. Changco*, 1 F.3d 837, 840 n.1 (10th Cir. 1993) (stating that surnames would not ordinarily suffice for a *Batson* claim because panel members with Hispanic surnames could have obtained those names through marriage or adoption); *United States v. Castro*, No. 91-3144, 965 F.2d 279, 1992 WL 37352, at *3 (10th Cir. Feb. 24, 1992) ("While the arguably Hispanic surname may suggest a plausible inference, and while racial identity may be clear from appearance at voir dire, we cannot sustain a *Batson* challenge on conjecture.") (citing *United States v. Esparsen*, 930 F.2d 1461, 1466-67 (10th Cir. 1991)); *United States v. Campione*, 942 F.2d 429, 433 (7th Cir. 1990) ("Given the examination process available in the selection of a petit jury, the spelling of a person's surname is insufficient – standing alone – to show that he or she belongs to a particular ethnic group.").

The sort of examination contemplated by the Seventh and Tenth Circuits (and advanced by the Fifth Circuit panel in oral argument here) appears to conflict with this Court's statements in *Hernandez* and *Castaneda*. Indeed, such a requirement would be contrary to the very purpose of *Batson* and the

Fourteenth Amendment, requiring an inquiry into the race and national origin of jurors who appear less than (or more than) white or who have non-obviously Anglo surnames. Such an inquiry likely would itself violate the jurors' Fourteenth Amendment rights:

> Q: Mr. Torres, are you Hispanic, or were you adopted by a Hispanic family?
>
> Q: Mrs. Rodriguez, are you Hispanic, or did you marry into a Hispanic family?
>
> Q: Mr. Montanes, you have dark skin, are you Hispanic or are you just very tan?

These illustrations demonstrate the absurdity of adopting a standard requiring a defendant to prove the ethnicity of jurors beyond a showing of surnames that the Census Bureau has identified as being the "most frequently occurring heavily Hispanic surnames." By using Hispanic surnames as a proxy for being Hispanic, Mr. Flores can prevail under a plain error standard. At the very least, certiorari is warranted to address the conflict regarding the standard for satisfying the second prong of the *Batson* analysis for Hispanic defendants. Indeed, this Court could find that striking panel members with Hispanic surnames demonstrates discriminatory intent whether or not they are "actually" Hispanic because such strikes would evidence a belief that they may be more sympathetic to a Hispanic defendant – a clear violation of *Batson*.

B. The Fourteenth Amendment and *Batson* confer substantial rights.

Peremptory challenges normally may be exercised in any way the Government sees fit. The exception in *Batson*, though, "depends on this Nation's profound commitment to the ideal of racial equality, a commitment that refuses to permit the State to act on the premise that racial differences matter." *Brown v. North Carolina*, 479 U.S. 940, 940 (1986) (O'Connor, J., concurring in denial of writ of certiorari). Indeed, considerations of race in selecting juries "is particularly pernicious because it constitutes a badge of oppression that is unfaithful to the central promise of the Fourteenth Amendment." *Wygant v. Jackson Bd. of Educ.*, 476 U.S. 267, 314 (1986). There can be little doubt that the aims of the Fourteenth Amendment and *Batson* and the rights that they confer are substantial.

C. A *Batson* violation affects the fairness, integrity, and public reputation of the judicial system.

Batson does not protect only the on-trial defendant; instead, it extends to the entire community, and the failure to enforce Batson "undermine[s] public confidence in the fairness of our system of justice." *Johnson v. California*, 545 U.S. 162, 172 (2005) (quoting *Batson*, 476 U.S. at 87). In fact, because of the importance of protecting Fourteenth Amendment rights and the inherent speculation involved in guessing whether a jury with a different racial

makeup would come to a different result, this Court has never required a defendant to demonstrate harm in the *Batson* context. *See, e.g, Batson,* 476 U.S. at 100 (stating that if "the facts establish, prima facie, purposeful discrimination and the prosecutor does not come forward with a neutral explanation for his action, our precedents require that petitioner's conviction be reversed"); *see also Snyder*, 128 S. Ct. at 1212 (reversing once defendant established three prongs required by *Batson* and not conducting a harm or prejudice analysis); *Miller-El,* 545 U.S. at 266 (conducting no harm or prejudice analysis after finding *Batson* violation). Accordingly, the substantial right for which petitioner seeks redress *per se* affected the fairness, integrity, and public reputation of his trial.

In short, petitioner can meet the stringent requirements of Rule 52(b). As shown below, he should be given this opportunity.

IV. RULE 52(B) SHOULD APPLY, AND THE IMPORTANCE OF CORRECTING THE ERROR JUSTIFIES THE GRANT OF CERTIORARI

Rule 52(b) is in place for just this sort of situation, where a substantial right was affected but "was not brought to the court's attention." FED. R. CRIM. P. 52(b). Defendants have been allowed to appeal using Rule 52(b) for errors that involved equally or less substantial rights than those at issue here, and there

can be no principled reason for denying review. *See, e.g., Vonn*, 535 U.S. at 74-76 (using Rule 52(b) to analyze error in failing to advise defendant during plea bargain colloquy of his right to counsel should he go to trial when defendant did not object); *United States v. Olano*, 507 U.S. 725, 740 (1993) (using Rule 52(b) to analyze error when trial court allowed alternate jurors to observe deliberations when defendant did not object); *United States v. Young*, 470 U.S. 1, 20 (1985) (utilizing Rule 52(b) to analyze whether conviction should be reversed when prosecutor made improper remarks during closing argument).

Batson and its progeny would be of little or no benefit to an indigent defendant like Mr. Flores, who now stands on the precipice of unknowingly waiving his constitutional rights because his appointed counsel was either unaware of or refused to protect them, or just simply "missed it." Equal protection rights should not be considered waived so expediently.

Other constitutional protections – such as the right to counsel, the right to a jury trial, the right against self-incrimination, and the right to appeal – are explained to the criminal defendant, who then can knowingly waive or enforce those rights. *See Olano*, 507 U.S. at 733 (stating that "a defendant who knowingly and voluntarily pleads guilty . . . cannot have his conviction vacated by court of appeals on the grounds that he ought to have had a trial . . . because the defendant who enters a valid guilty plea waives that right"). Fourteenth Amendment and *Batson* rights, however, are not explained to defendants, and

thus they do not make a knowing and voluntary waiver of those rights. *See id.* (defining waiver as the "intentional relinquishment or abandonment of a known right").[5] This is, at least in part, why the majority of circuit courts are correct in holding that counsel's failure to make a contemporaneous *Batson* challenge constitutes a forfeiture reviewable under Rule 52(b) rather than a waiver.

If, in fact, Mr. Flores has forever waived his Fourteenth Amendment rights because his appointed counsel failed to object in the face of the exclusion of all Hispanic panel members, then *Batson* will have failed precisely those who need it the most. The answer does not lie solely with an ineffective assistance claim; rather, plain error review is warranted on direct appeal, as is allowed in the majority of circuit courts.

Finally, the plain error standard is workable. It has worked in the seven circuit courts (and at least five states) that currently apply it in the *Batson* context. And as demonstrated above, it can work here, where the defendant is Hispanic, where all relevant panel members with Hispanic surnames were struck, and where there were no answers given in voir dire that would differentiate the Hispanic and

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[5] We cannot infer counsel's knowledge to the defendant. Otherwise, all rights would be presumed known, and the failure to object would always be a waiver, rather than a forfeiture, and Rule 52(b) would become superfluous.

non-Hispanic panel members. These issues can only gain importance as the population turns into a minority-majority, and where the Hispanic population is growing swiftly. This issue will arise again, both in state and federal courts, and the Court can resolve two serious circuit splits by granting certiorari and resolving this appeal on the merits. Resolution is not important just to Mr. Flores, but to all minority defendants and panel members and to the system of justice as a whole.

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be granted.

Respectfully submitted,

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Attorney for Petitioner

IN THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

No. 04-51138

UNITED STATES OF AMERICA

Plaintiff-Appellee

v.

JAIME DURAN FLORES

Defendant-Appellant

Appeal from the United States District Court
for the Western District of Texas
U.S.D.C. No. 7:04-CR-67-4

(Filed Aug. 7, 2008)

Before JOLLY, CLEMENT, and OWEN, Circuit Judges.

PER CURIAM:*

Jaime Flores was convicted of being a felon in possession of a firearm in violation of 18 U.S.C.

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* Pursuant to 5TH CIR. R. 47.5, the court has determined that this opinion should not be published and is not precedent except under the limited circumstances set forth in 5TH CIR. R. 47.5.4.

§ 922(g)(1). The Government presented circumstantial evidence against Flores, and a jury found him guilty as charged. Flores appeals his conviction and sentence. We hold that the district court committed no error, and we therefore AFFIRM.

I.

Flores was indicted for being a felon in possession of a firearm. The indictment alleged that, having been convicted of a felony, he possessed a firearm on or around February 11, 2004 in Midland, Texas. He pled not guilty and was tried before a jury. The evidence against Flores was, as the Government acknowledged at trial, circumstantial. Most of the facts of the case are undisputed by Flores, except for the ultimate conclusion that he in fact possessed the firearm at issue.[1]

At trial, the Government introduced the testimony of Roy Harrell, the owner of the gun Flores was alleged to have possessed. Harrell testified that, on the evening of February 11, 2004, he placed his pistol on a chair in his den. That evening, he was visited by Kimberly Montgomery and a man she introduced as her brother, Marc. Upon Montgomery's request,

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[1] The Government introduced evidence that the pistol had traveled in interstate commerce and that Flores had been convicted of three felonies. Flores's counsel offered to stipulate to the felonies, but agreed that the Government's witness could testify to the names and dates of the convictions. Flores does not contest these elements of his offense on appeal.

Harrell went outside to inspect Montgomery's car, which had been in a collision. Marc stayed in the den. After his visitors had left, Harrell noticed that the pistol was missing and called the police.

Montgomery testified that, "somewhere around" 7:30 or 8:30 P.M., she traded the firearm to Manuel Antonio Mata, for one hundred dollars' worth of heroin. Montgomery testified that she went to Mata's house, then accompanied him to his vehicle and placed the gun in the vehicle. During the exchange, Mata made a phone call from his cell phone, speaking in Spanish. Phone records show that Mata made a call to the number of Flores's common law wife at 7:19 P.M., around the time Montgomery was with Mata.

Sergeant Mitch Russell testified that he interviewed Montgomery on the day after the theft, February 12. After interviewing her associate Marc, Sergeant Russell spoke to Mata. Russell told Mata that the police needed the gun that had been stolen from Harrell. Russell testified that Mata then made a phone call on his cell phone.[2] Russell could tell that Mata and the male recipient of the call were speaking English and Spanish. Mata's phone records reflect that the call lasted approximately eleven minutes and that the call was made to the number of Flores's common law wife. Sergeant Russell testified that,

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[2] Mata did not testify, and no direct evidence of the content of his phone call was introduced.

immediately after making the outgoing call, Mata went with Officer Debbie Barnes to the Coventry Pointe Apartments to retrieve the pistol. They returned fifteen minutes later with the missing pistol. Russell testified that the Coventry Pointe Apartments were located on a street one to one-and-a-half blocks from Flores's home.

Officer Barnes testified that she assisted Sergeant Russell in locating a missing gun. Barnes testified that, during the investigation on February 12, she observed Mata speaking on his cell phone with a man Barnes understood to know the whereabouts of the gun. Barnes and another officer went to the Coventry Pointe Apartments in Midland to pick up the gun. She and the other officer searched the dumpsters behind the apartments for the missing gun. She was looking in one dumpster and the other officer looked in another. Barnes found the gun in a Toys 'R' Us bag, and ultimately released it to Sergeant Russell. The pistol was found wrapped in a Wendy's bag, inside the Toys 'R' Us bag. The pistol was identified as the one stolen from Roy Harrell.

The Government relied on two items of circumstantial evidence to connect the defendant Flores to the pistol. First, Sergeant Russell identified in Mata's phone records a call placed at 7:19 P.M. on February 11 to a phone number registered to Flores's common law wife and that Flores listed as his own when admitted into jail. Sergeant Russell also identified a call that Mata made to the same number at 11:19 P.M. on February 12, during the time Sergeant

Russell was questioning Mata. He identified the 11:19 call as the call Mata placed immediately before going with officers to retrieve the stolen firearm.

Second, the Government introduced evidence that the Toys 'R' Us bag in which the gun was found also contained a receipt, marked with a time and date corresponding with the time and date of surveillance footage of Flores and a child making a purchase at the Midland Toys 'R' Us.

The Government's theory of the case was that, when Mata called Flores while the police questioned him, Flores told Mata where the pistol was. The Government asked the jury to infer that Flores put the pistol in the dumpster.

Flores testified in his own defense. His attorney asked if he had been in any trouble since he got out of prison after a 1989 felony conviction, and Flores replied that he had not. Flores testified that Mata was his childhood friend, the godson of Flores's own father. Flores testified that he associates with Mata and speaks to him frequently, attempting to get Mata off drugs. Flores also testified that Mata came to his house on or around February 11 or 12 and wanted Flores to purchase a gun. Flores testified that he said to Mata: "I can't possess no guns, to get that gun away from there." He testified that he never saw or handled the gun.

Flores further testified that he had purchased a video game for his grandson at Toys 'R' Us. He testified that the Toys 'R' Us bag in which the pistol was

found had meaning to him because Mata asked him for a bag the day that he came to Flores's house. Flores testified that he spoke with Mata on the phone around 11:00 P.M. on February 12, but that the conversation was about Mata "trying to get a job back with us" at the construction company where Flores worked. He testified that there was no discussion about recovering the gun.

On cross-examination, Flores admitted that he pled no contest and was convicted in 1992 of unlawfully carrying a weapon and evading detention, for which he served one day in jail. He also was convicted in 1993 of possession of marijuana, for which he was given a $250.00 fine. He admitted that the statement that he had been a law-abiding citizen since 1989 was a lie to the jury. Flores also admitted that he was not truthful to his parole boards when he told them that he would not commit any more offenses, but later did.

The jury found Flores guilty of possession of a firearm in violation of 18 U.S.C. § 922(g)(1). The district court sentenced Flores within the Sentencing Guidelines range to 86 months of imprisonment.

II.

Flores raises a number of challenges to his conviction. He contends that the prosecution used peremptory challenges to strike Hispanic jurors in violation of *Batson v. Kentucky,* 476 U.S. 79 (1986). Flores also contends that the evidence against him was insufficient to support his conviction. He contends that the

district court erred in admitting testimonial hearsay in violation of Federal Rule of Evidence 802 and also in violation of the Confrontation Clause of the United States Constitution. Flores also contends that his sentence is unreasonable. Finally, Flores contends that he received ineffective assistance of counsel.[3]

III.

A.

Flores contends that the prosecution used its peremptory strikes effectively to exclude all potential jurors with Hispanic last names in violation of the Equal Protection Clause, as explained in *Batson*. Flores did not raise this claim in the district court. We have held that "because a timely objection is an essential prerequisite to a *Batson* claim," a defendant is not entitled to raise a *Batson* claim on appeal if he did not object to the prosecutor's use of peremptory challenges in the district court. *United States v. Pofahl*, 990 F.2d 1456, 1465 (5th Cir. 1993). We have held that a *Batson* challenge must be made before the venire panel is dismissed.[4] *United States v.*

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[3] Flores has expressly abandoned his claims based on *Old Chief v. United States*, 519 U.S. 172 (1997).

[4] *United States v. Parsee*, 178 F.3d 374, 378 (5th Cir. 1999), may be distinguished. In *Parsee*, the defendant made a *Batson* claim on the basis of racial discrimination at the appropriate time. *Id.* On appeal, the defendant raised a gender-based claim, and we stated that we would review the new basis for the *Batson* claim for plain error. *Id.* at 378-79. Here, Flores made no

(Continued on following page)

Abou-Kassem, 78 F.3d 161, 167 (5th Cir. 1996). *See also Thomas v. Moore,* 866 F.2d 803, 805 (5th Cir. 1989) ("A timely objection and the corresponding opportunity to evaluate the circumstances of the jury selection process are essential to a trial court's reasoned application of the limitations placed on peremptory challenges by the *Batson* holding."). In fact, we have held that the trial court should note the untimeliness of a *Batson* challenge made after the venire is dismissed and reject the challenge *sua sponte* if the party opposing the motion does not object. *Garcia v. Excel Corp.,* 102 F.3d 758, 759 (5th Cir. 1997). We will not address this claim raised for the first time on appeal.

B.

Flores contends that the evidence against him is insufficient to support his conviction. He moved for judgment of acquittal at the close of the Government's case and renewed his motion at the end of trial. Because he properly preserved the objection, our review is *de novo. United States v. Williams,* 520 F.3d 414, 420 (5th Cir. 2008). We will affirm if "a reasonable trier of fact could find that the evidence establishes guilt beyond a reasonable doubt." *United States*

Batson claim at all in the district court. Moreover, to the extent that *Parsee* is inconsistent with our earlier precedents holding that *Batson* claims may not be heard on appeal if not timely brought, the earlier precedent controls. *See e.g., United States v. Walker,* 302 F.3d 322, 325 (5th Cir. 2002).

v. Bell, 678 F.2d 547, 549 (5th Cir. 1982) (en banc). The evidence and all reasonable inferences drawn from it are to be viewed on appeal in the light most favorable to the Government. *Id.* "In addition, all credibility determinations are made in the light most favorable to the verdict." *United States v. Moreno,* 185 F.3d 465, 471 (5th Cir. 1999). "The evidence need not exclude every reasonable hypothesis of innocence or be wholly inconsistent with every conclusion except that of guilt, and the jury is free to choose among reasonable constructions of the evidence." *United States v. Ortega Reyna,* 148 F.3d 540, 543 (5th Cir. 1998) (citation and internal quotation marks omitted). However, if the evidence "gives equal or nearly equal circumstantial support to a theory of guilt and a theory of innocence," we should reverse because "under these circumstances a reasonable jury must necessarily entertain a reasonable doubt." *United States v. Ramos-Garcia,* 184 F.3d 463, 465 (5th Cir. 1999) (citations and some internal quotation marks omitted).

To establish a violation of § 922(g)(1), the Government has the burden to prove beyond a reasonable doubt: "(1) that the defendant previously had been convicted of a felony; (2) that he possessed a firearm; and (3) that the firearm traveled in or affected interstate commerce." *United States v. Guidry,* 406 F.3d 314, 318 (5th Cir. 2005). Flores does not dispute on appeal that he had been convicted of a felony or that the firearm at issue traveled in interstate commerce.

His sole challenge is to the sufficiency of the Government's evidence that he possessed a firearm.

Possession may be actual or constructive. *United States v. Munoz,* 150 F.3d 401, 416 (5th Cir. 1998). "Actual possession means the defendant knowingly has direct physical control over a thing at a given time. Constructive possession means ownership, dominion or control over a thing, or control over the premises where the thing is found." *Id.* (citations omitted). Possession may be shown through either direct or circumstantial evidence. *Id.*

In this case, the Government did not attempt to show that Flores had dominion or control over the firearm at issue or controlled the premises where it was found. Instead, it attempted to show, through circumstantial evidence, that Flores actually possessed the firearm at issue and had direct physical control over it at some point on or around February 12. While it is true possession may be proved by circumstantial evidence, that evidence must still be sufficient to support the verdict. We have held, for example, that evidence of a felon's thumb print on a box of ammunition found in his girlfriend's home was insufficient on its own for a reasonable jury to find actual possession. *United States v. De Leon,* 170 F.3d 494, 497 (5th Cir. 1999) (holding nevertheless that the evidence supported a theory of constructive possession).

In this case, the jury was presented with two interpretations of the evidence. The Government's

interpretation was that Mata gave or sold the weapon to Flores, later called Flores to determine where the weapon might be found, and then led police to the dumpster near Flores's home in which Flores had placed the weapon. This interpretation of the evidence is not unreasonable. Thus, there is circumstantial evidence that suggests that Flores possessed the firearm: Mata called Flores in response to the police officers' demand that he, Mata, return the gun; Mata promptly took the police to retrieve it; and the gun was found near Flores's apartment in a bag Flores had recently possessed. Although the circumstantial evidence does not require a conclusion that Flores possessed the gun, we cannot say that it gives equal or nearly equal support to a theory of innocence. Additionally, the jury was entitled to consider and reject Flores's testimony explaining his lack of connection with the gun.

Flores's explanation of the evidence was that he never possessed the weapon. Mata offered it to him, but he refused it. Mata called him while police were questioning him, but the conversation was about Mata trying to get a job at Flores's place of employment. Although the Toys 'R' Us bag was his, Mata had asked for it when he came to Flores's apartment with the gun. Although Flores's version of the story is not directly contradicted by any evidence, in the light of all of the circumstances, it can be seen as less plausible than the Government's interpretation.

Furthermore, Flores's dubious explanation of his phone conversation with Mata can be seen to bolster

the prosecution's theory of the case – especially because it removes from contention other possible explanations for the phone call, for example, that Flores merely knew for some reason where the firearm was, but had never actually possessed it. It is true that we have held that a denial of guilt cannot be treated as evidence of guilt. However, when a defendant goes further than a denial and gives an implausible or controverted alibi or explanation, his testimony may be considered evidence of consciousness of guilt. *See United States v. Sutherland,* 428 F.2d 1152, 1157 (5th Cir. 1970) (holding that the defendant's alibi, rebutted by the Government, could be evidence of guilt); *see also United States v. Hunt,* 129 F.3d 739, 744 (5th Cir. 1997) (acknowledging *Sutherland* rule and holding that denial of use of crack could not lead to inference that defendant intended to distribute crack). Here, the circumstantial evidence against Flores, although not eliminating every hypothesis of innocence, is quite sufficient to allow the jury to make reasonable choices that could support a finding of guilt beyond a reasonable doubt. Furthermore, Flores's testimony could bolster the circumstantial evidence of guilt by excluding some more plausible hypotheses of innocence. Although the evidence against Flores may not suggest only one doubtless and irrefutable conclusion, we review the jury's verdict with great deference and conclude that the evidence is substantial enough to protect a finding of guilt.

C.

We now turn to Flores's arguments under the hearsay rule and the Confrontation Clause. Flores first contends that evidence that Mata made a phone call to Flores and then directed officers to the dumpster containing the firearm was nonverbal assertive conduct. He argues that it permits the inference that Mata told the officers that Flores told him the location of the firearm, and therefore amounts to hearsay evidence.

During the trial, Sergeant Russell was asked what he told Mata when investigating the missing firearm. Russell answered, "That we needed the gun back that had been stolen from Mr. Harrell, that we knew – I knew that he had been involved in it." Flores made an objection to testimony relating anything that Mata had said, and the court sustained the objection. The Government asked what Mata did next. Sergeant Russell testified that Mata made a call from his cell phone. Flores objected to Russell's testimony that Mata spoke in English and Spanish. The objection was overruled. The Government then asked what Mata did immediately after the call, and Russell replied that Mata "[w]ent with Officer Barnes to the Coventry Pointe Apartments to retrieve the pistol." Officer Barnes testified similarly that Mata made a phone call and subsequently assisted her in locating the firearm. The district court sustained Flores's hearsay objection to testimony regarding what Mata said during the phone call. Flores contends that the preceding evidence is identical in

substance to the police officers testifying that "Mr. Mata told me that Mr. Flores said the firearm was in the dumpster."

Flores did not make a hearsay objection to testimony about Mata's nonverbal acts. Therefore, we review for plain error. *See e.g., United States v. Mendoza-Medina,* 346 F.3d 121, 131 (5th Cir. 2003). To establish plain error, Flores must show an error that is clear and obvious and that affected his substantial rights. *United States v. Cisneros-Gutierrez,* 517 F.3d 751, 760 (5th Cir. 2008). We will exercise discretion to correct the forfeited error only "if the error seriously affects the fairness, integrity, or public reputation of judicial proceedings." *United States v. Hernandez-Martinez,* 485 F.3d 270, 273 (5th Cir. 2007).

Here, Flores has shown no error, plain or otherwise, in the admission of Sergeant Russell's testimony regarding Mata's actions. The Government did not present hearsay evidence. Federal Rule of Evidence 801(c) defines hearsay as a "statement, other than one made by the declarant while testifying at the trial or hearing, offered in evidence to prove the truth of the matter asserted." A "statement" under Rule 801(a) is "(1) an oral or written assertion or (2) nonverbal conduct of a person, if it is intended by the person as an assertion." We have held that Rule 801 removes implied assertions from the coverage of the hearsay rule. *United States v. Lewis,* 902 F.2d 1176, 1179 (5th Cir. 1990) (holding that the question "Did you get the stuff?" was not a statement and therefore not hearsay).

Here, the Government did not introduce evidence of a "statement" made by Mata, under the meaning of Rule 801. Mata's actions following his phone call were not an assertion or conduct intended as an assertion.[5] Although it may be reasonable to draw the conclusion that Mata learned the location of the firearm from his conversation with Flores, the prosecution did not present evidence that Mata *asserted* this conclusion or intended by his actions to do so. The contested evidence is therefore not hearsay, and Flores has shown no plain error.

Flores also contends that evidence concerning Mata's phone call and subsequent conduct violated the Confrontation Clause, as articulated in *Crawford v. Washington,* 541 U.S. 36 (2004). We review properly preserved Confrontation Clause objections *de novo,* subject to harmless error analysis. *United States v. Pryor,* 483 F.3d 309, 312 (5th Cir. 2007).

Under *Crawford,* testimonial statements of a witness not appearing at trial may not be admitted unless the witness is unavailable and the defendant had a prior opportunity to cross-examine the witness.

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[5] This case is therefore unlike cases in which we have held that pointing to or pointing out something can, in some circumstances, be nonverbal hearsay. *See United States v. Caro,* 569 F.2d 411, 417 n.9 (5th Cir. 1978) (holding that pointing out a vehicle containing the defendant's source was assertive conduct); *United States v. Silvas,* No. 92-5586, 1993 WL 261046, at *3 n.2 (5th Cir. June 29, 1993) (unpublished) (holding that pointing to a hole in the ground containing the proceeds of a robbery was a statement for purposes of Rule 801(a)(2)).

541 U.S. at 55-56. In *Crawford,* the Court eschewed a comprehensive definition of "testimonial," but referenced a definition of "testimony" as "[a] solemn declaration or affirmation made for the purpose of establishing or proving some fact." *Id.* at 51. The Confrontation Clause does not bar the use of testimonial statements for purposes other than establishing the truth of the matter asserted. *Id.* at 59 n.9.

Mata's actions – making a phone call to Flores and going with police to retrieve the missing firearm – are not testimonial statements prohibited by the Confrontation Clause. *See United States v. Lopez-Moreno,* 420 F.3d 420, 436 (5th Cir. 2005) (holding that photocopy of an identification card does not qualify as a testimonial statement because it "in no way involves a witness bearing testimony"); *see also United States v. Washington,* 498 F.3d 225, 230 (4th Cir. 2007) (stating that "while the hearsay rules of the Federal Rules of Evidence do not formally demarcate the scope of 'statements' for Confrontation Clause purposes, we take [the definition of statement in Rule 801(a)] to be uncontroversial"). Mata's actions were neither a declaration nor an affirmation and do not resemble a witness bearing testimony. Because his actions are not evidence of assertions made by Mata, they were not introduced for the purpose of establishing the truth of a matter asserted. The district court did not err in allowing evidence of Mata's actions.

Flores also contends, as he did in the district court, that the admission of Mata's cell phone records

showing the numbers called during the dates surrounding the firearm's theft and recovery violates the Confrontation Clause. However, the phone records were business records, which the *Crawford* Court noted are not testimonial in nature. 541 U.S. at 56; *see also Lopez-Moreno,* 420 F.3d at 437 (holding that records from the Bureau of Customs and Immigration's computer system showing dates of deportation were akin to business records and not barred by the Confrontation Clause). Therefore, the admission of the records did not violate Flores's constitutional rights.[6]

D.

Flores contends that his sentence of 86 months of imprisonment is unreasonable. His sentence was in the middle of the Sentencing Guidelines range of 77-96 months. Flores contends that the district court did not consider the nature and characteristics of his offense, as required by 18 U.S.C. § 3553(a). Alternatively, Flores argues that the district court abused its discretion in sentencing him in the middle of the

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[6] Flores argues that the phone records should have been inadmissible on the additional ground that they were subpoenaed after trial exhibits were to be exchanged and not produced until days before trial. Even if the Government had violated the district court's discovery order, this court has held that the district court has broad discretion in responding to discovery abuses. *United States v. Martinez-Perez,* 941 F.2d 295, 302 (5th Cir. 1991). Flores has not shown that the district court abused its discretion here.

Guidelines range, rather than at the lower end. Flores also contends that the district court failed to adequately explain its sentence.

Flores made no objections to his sentence in the district court, so we review for plain error. *See United States v. Molina,* 530 F.3d 326, 329 (5th Cir. 2008). We apply a presumption of reasonableness when reviewing sentences within a properly calculated Guidelines range. *See, e.g., Cisneros-Gutierrez,* 517 F.3d at 766.

In *Rita v. United States,* 127 S.Ct. 2456, 2468 (2007), the Supreme Court stated that consideration of § 3553(a) factors does not always require a lengthy explanation on the record and that, in many cases, the sentencing court may rest its decision upon the Commission's reasoning that the Guidelines sentence adequately accounts for the § 3553(a) factors in the case before him. A lengthier explanation may be required when the defendant makes a reasonable argument against applying the Guidelines sentence. *Id.*

The district court here reviewed the presentence report, found it to be accurate and correct, and adopted its findings and Guidelines calculation. The court noted the sentences imposed on two of the other parties involved, Mata and Montgomery, and judged Flores's sentence to be appropriate. No arguments were made against applying the Guidelines sentence. Flores only requested a sentence at the low end of the Guidelines range because he had turned his life

around since his earlier convictions. We hold that Flores has not overcome the presumption that his sentence within the correct Guidelines range is reasonable and has not demonstrated any plain error in his sentence.

E.

Flores argues that his counsel was ineffective in failing to raise his *Batson* claim and in other respects. We have held that "Sixth Amendment claims of ineffective assistance of counsel should not be litigated on direct appeal, unless they were previously presented to the trial court." *United States v. Aguilar,* 503 F.3d 431, 436 (5th Cir. 2007) (quoting *United States v. Partida,* 385 F.3d 546, 568 (5th Cir. 2004)). We will only consider such claims on direct appeal in rare cases in which the record allows the court to fairly evaluate the merits of the claim. Flores's claim was not presented to the trial court, so we will not consider it on direct appeal.

IV.

For the foregoing reasons, Flores's conviction and sentence are

AFFIRMED.

UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 04-51138

D.C. Docket No. 7:04-CR-67-4

UNITED STATES OF AMERICA

Plaintiff-Appellee

v.

JAIME DURAN FLORES

Defendant-Appellant

Appeal from the United States District Court
for the Western District of Texas, Midland.

(Filed Aug. 7, 2008)

Before JOLLY, CLEMENT, and OWEN, Circuit Judges.

JUDGMENT

This cause was considered on the record on appeal and was argued by counsel.

It is ordered and adjudged that the judgment of the District Court is affirmed.

ISSUED AS MANDATE: Sep 17 2008

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 04-51138

UNITED STATES OF AMERICA

Plaintiff-Appellee

v.

JAIME DURAN FLORES

Defendant-Appellant

Appeal from the United States District Court
for the Western District of Texas, Midland.

ON PETITION FOR REHEARING EN BANC

(Filed Sep. 9, 2008)

(Opinion 8/7/08, 5 Cir., ___, ___ F.3d ___)

Before JOLLY, CLEMENT, and OWEN, Circuit Judges.

PER CURIAM:

(X) Treating the Petition for Rehearing En Banc as a Petition for Panel Rehearing, the Petition for Panel Rehearing is DENIED. No member of the panel nor judge in regular active service of the court having requested that the court be polled on Rehearing En

Banc (FED. R. APP. P. and 5TH CIR. R. 35), the Petition for Rehearing En Banc is DENIED.

( ) Treating the Petition for Rehearing En Banc as a Petition for Panel Rehearing, the Petition for Panel Rehearing is DENIED. The court having been polled at the request of one of the members of the court and a majority of the judges who are in regular active service and not disqualified not having voted in favor (FED. R. APP. P. and 5TH CIR. R. 35), the Petition for Rehearing En Banc is DENIED.

ENTERED FOR THE COURT:

/s/ E. Grady Jolly
United States Circuit Judge

UNITED STATES DISTRICT COURTS
WESTERN DISTRICT OF TEXAS
JUROR ROSTER
06/07/2004

[USA

vs. [MO-04-CR-067]

Jaime Duran Flores]

~~1)~~ ~~JUROR: KENNETH E DIAMOND~~ ~~JUROR NO: P-05-7 (183)~~

~~OCCUPATION: SECURITY OFFICER~~ ~~701163360~~

~~SPOUSE OCCUPATION: HOMEMAKER~~ ~~COUNTY: Ector~~

~~SELECTED/SERVING ___ CHALLENGED ___ EXCUSED ___ OTHER ___~~

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2) JUROR: LAURA J LONG JUROR NO: P-05-7 (146)

OCCUPATION: COMPUTER SPECIALIST 701168238

SPOUSE OCCUPATION: NA COUNTY: Ector

SELECTED/SERVING ___ CHALLENGED ___
EXCUSED ___ OTHER ___

~~3)~~ ~~JUROR: MELISSA A PIPPEN~~ ~~JUROR NO: P-05-7 (132)~~

~~OCCUPATION: RECEPTIONIST~~ ~~701171259~~

~~SPOUSE OCCUPATION: ROUTE MANAGER~~ ~~COUNTY: Ector {Cause}~~

~~SELECTED/SERVING ___ CHALLENGED ___~~
~~EXCUSED ___ OTHER ___~~

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4) JUROR: CHRISTOPHER L MUELLER — JUROR NO: P-05-7 (181)

OCCUPATION: ELECTRICIAN — 701170050

SPOUSE OCCUPATION: NA — COUNTY: Midland

SELECTED/SERVING ___ CHALLENGED ___
EXCUSED ___ OTHER ___

~~5) JUROR: THOMAS TODD~~ ~~JUROR NO: P-05-7 (82)~~

~~OCCUPATION: RETIRED CO. COMMISSIONER~~ ~~701174544~~

~~SPOUSE OCCUPATION: WIDOWED~~ ~~COUNTY: Ector [Cause]~~

~~SELECTED/SERVING ___ CHALLENGED ___~~
~~EXCUSED ___ OTHER ___~~

~~6) JUROR: MARIA MONDRAGON~~ ~~JUROR NO: P-05-7 (190)~~

~~OCCUPATION: NONE LISTED~~ ~~701173704~~

~~SPOUSE OCCUPATION: UNEMPLOYED PAINTER~~ ~~COUNTY: Ector~~

~~SELECTED/SERVING ___ CHALLENGED ___~~
~~EXCUSED ___ OTHER ___~~

~~7)~~ ~~JUROR: VERNON R DAY~~ ~~JUROR NO: P-05-7 (91)~~

~~OCCUPATION: FIELD SPECIALIST~~ ~~701163222~~

~~SPOUSE OCCUPATION: SELF EMPLOYED~~ ~~COUNTY: Upton~~

~~SELECTED/SERVING ___ CHALLENGED ___ EXCUSED ___ OTHER ___~~

~~8)~~ ~~JUROR: DERRICK S BUSH~~ ~~JUROR NO: P-05-7 (171)~~

~~OCCUPATION: SELF EMPLOYED~~ ~~701161698~~

~~SPOUSE OCCUPATION:~~ ~~COUNTY: Ector~~

~~SELECTED/SERVING ___ CHALLENGED ___ EXCUSED ___ OTHER ___~~

~~9)~~ ~~JUROR: FRANCIS S HARTMANN~~ ~~JUROR NO: P-05-7 (80)~~

~~OCCUPATION: EXEC DIR UNIVERSITY LANDS~~ ~~701165901~~

~~SPOUSE OCCUPATION: BOOKKEEPER~~ ~~COUNTY: Midland~~

~~SELECTED/SERVING ___ CHALLENGED ___ EXCUSED ___ OTHER ___~~

~~10)~~ ~~JUROR: CYNTHIA A BYER~~ ~~JUROR NO: P-05-7 (102)~~

~~OCCUPATION: MACHINIST~~ ~~701161752~~

~~SPOUSE OCCUPATION: NA~~ ~~COUNTY: Ector~~

~~SELECTED/SERVING ___ CHALLENGED ___~~
~~EXCUSED ___ OTHER ___~~

~~11) JUROR: BILLY E STANFORD~~ ~~JUROR NO: P-05-7 (67)~~

~~OCCUPATION: SALES REP~~ ~~701173815~~

~~SPOUSE OCCUPATION: AUDITOR~~ ~~COUNTY: Ector~~

~~SELECTED/SERVING ___ CHALLENGED ___~~
~~EXCUSED ___ OTHER ___~~

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12) JUROR: GREGORY BURNETT JUROR NO: P-05-7 (150)

OCCUPATION: SELF/MFG HOMES 701161650

SPOUSE OCCUPATION: SELF/MFG HOMES COUNTY: Midland

SELECTED/SERVING ___ CHALLENGED ___
EXCUSED ___ OTHER ___

~~13) JUROR: JOHN B ENGLISH~~ ~~JUROR NO: P-05-7 (200)~~

~~OCCUPATION: DRILLING CONSULTANT~~ ~~701163876~~

~~SPOUSE OCCUPATION: HOMEMAKER~~ ~~COUNTY: Midland~~

~~SELECTED/SERVING ___ CHALLENGED ___~~
~~EXCUSED ___ OTHER ___~~

~~14) JUROR: SANDRA LYNN SNOW~~ ~~JUROR NO: P-05-7 (189)~~

~~OCCUPATION: BOOKKEEPER~~ ~~701173641~~

~~SPOUSE OCCUPATION: ENGINEER~~ ~~COUNTY: Andrews~~

~~SELECTED/SERVING ___ CHALLENGED ___ EXCUSED ___ OTHER ___~~

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15) JUROR: CASSANDRA SCOTT LYONS — JUROR NO: P-05-7 (170)

OCCUPATION: TEACHER MISD — 701165814

SPOUSE OCCUPATION: NA — COUNTY: Midland

SELECTED/SERVING ___ CHALLENGED ___ EXCUSED ___ OTHER ___

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16) JUROR: TAMMIE E STEPHENS — JUROR NO: P-05-7 (162)

OCCUPATION: MEDICAL TECHNOLOGIST — 701162541

SPOUSE OCCUPATION: NA — COUNTY: Ector

SELECTED/SERVING ___ CHALLENGED ___ EXCUSED ___ OTHER ___

---

17) JUROR: BARBARA J MOORE — JUROR NO: P-05-7 (81)

OCCUPATION: HOSPITAL NUTRITION SERVIC — 701169816

SPOUSE OCCUPATION: NA — COUNTY: Ector

SELECTED/SERVING ___ CHALLENGED ___
EXCUSED ___ OTHER ___

~~18) JUROR: LEE A CATALANO~~ ~~JUROR NO: P-05-7 (94)~~

~~OCCUPATION: FILE CLERK~~ ~~701162163~~

~~SPOUSE OCCUPATION: ATTORNEY~~ ~~COUNTY: Midland~~

~~SELECTED/SERVING ___ CHALLENGED ___~~
~~EXCUSED ___ OTHER ___~~

~~19) JUROR: HEIDI L SCOTT~~ ~~JUROR NO: P-05-7 (174)~~

~~OCCUPATION: UNEMPLOYED~~ ~~701173083~~

~~SPOUSE OCCUPATION: NA~~ ~~COUNTY: Ector~~

~~SELECTED/SERVING ___ CHALLENGED ___~~
~~EXCUSED ___ OTHER ___~~

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20) JUROR: JERRY D HALLMARK JUROR NO: P-05-7 (107)

OCCUPATION: SALES 701165652

SPOUSE OCCUPATION: DIRECTOR COUNTY: Ector

SELECTED/SERVING ___ CHALLENGED ___
EXCUSED ___ OTHER ___

~~21) JUROR: RICHARD B IRWIN~~ ~~JUROR NO: P-05-7 (198)~~

~~OCCUPATION: POLICE OFFICER~~ ~~701166927~~

~~SPOUSE OCCUPATION: BOOKKEEPER~~ ~~COUNTY: Andrews~~

~~SELECTED/SERVING ___ CHALLENGED ___ EXCUSED ___ OTHER ___~~

~~22) JUROR: ADRIAN G ZARATE~~ ~~JUROR NO: P-05-7 (92)~~

~~OCCUPATION: CASE MANAGER CORR CENTER~~ ~~701176227~~

~~SPOUSE OCCUPATION: NA~~ ~~COUNTY: Martin~~

~~SELECTED/SERVING ___ CHALLENGED ___ EXCUSED ___ OTHER ___~~

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23) JUROR: JEFFREY D STEPHENS JUROR NO: P-05-7 (161)

OCCUPATION: ROUTE DRIVER 701173878

SPOUSE OCCUPATION: MANAGER COUNTY: Ector

SELECTED/SERVING ___ CHALLENGED ___ EXCUSED ___ OTHER ___

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24) JUROR: JENNIFER M BRAYTON JUROR NO: P-05-7 (101)

OCCUPATION: TEACHER MISD 701161689

SPOUSE OCCUPATION: ENGINEER COUNTY: Midland

SELECTED/SERVING ___ CHALLENGED ___
EXCUSED ___ OTHER ___

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25) JUROR: SHARMAN K ADKINS JUROR NO: P-05-7 (66)

OCCUPATION: TEACHER ECISD 701159832

SPOUSE OCCUPATION: DIRECTOR CHARITY FOUND COUNTY: Ector

SELECTED/SERVING ___ CHALLENGED ___
EXCUSED ___ OTHER ___

~~26) JUROR: NEITA D COOPER JUROR NO: P-05-7 (151)~~

~~OCCUPATION: TEACHER 701162718~~

~~SPOUSE OCCUPATION: OILFIELD DISTRICT MGR COUNTY: Midland~~

~~SELECTED/SERVING ___ CHALLENGED ___~~
~~EXCUSED ___ OTHER ___~~

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27) JUROR: ERICA SMITH JUROR NO: P-05-7 (72)

OCCUPATION: LEGAL ASSISTANT 701173509

SPOUSE OCCUPATION: NA COUNTY: Midland

SELECTED/SERVING ___ CHALLENGED ___
EXCUSED ___ OTHER ___

~~28) JUROR: PASCUAL URIAS~~ ~~JUROR NO: P-05-7 (149)~~

~~OCCUPATION:~~ ~~701174802~~

~~SPOUSE OCCUPATION:~~ ~~COUNTY: Midland~~

~~SELECTED/SERVING ___ CHALLENGED ___ EXCUSED ___ OTHER ___~~

~~29) JUROR: JAMES G JOLLY~~ ~~JUROR NO: P-05-7 (180)~~

~~OCCUPATION: GEOLOGIST~~ ~~701167224~~

~~SPOUSE OCCUPATION: HOMEMAKER~~ ~~COUNTY: Midland~~

~~SELECTED/SERVING ___ CHALLENGED ___ EXCUSED ___ OTHER ___~~

~~30) JUROR: BILLIE J BROWN~~ ~~JUROR NO: P-05-7 (86)~~

~~OCCUPATION: RETIRED FOOD SERVICE~~ ~~701161413~~

~~SPOUSE OCCUPATION: RETIRED PHONE COMPANY~~ ~~COUNTY: Ector~~

~~SELECTED/SERVING ___ CHALLENGED ___ EXCUSED ___ OTHER ___~~

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31) JUROR: ROGER D BULMAN JUROR NO: P-05-7 (97)

OCCUPATION: MANUFACTURING 701161596

SPOUSE OCCUPATION: SECRETARY COUNTY: Crane

SELECTED/SERVING ___ CHALLENGED ___
EXCUSED ___ OTHER ___

---

32) JUROR: DAVID L SHUCK JUROR NO: P-05-7 (90)

OCCUPATION: RETIRED CHEMICAL ENGINEER 701173302

SPOUSE OCCUPATION: RETIRED COUNTY: Midland

SELECTED/SERVING ___ CHALLENGED ___
EXCUSED ___ OTHER ___

---

33) JUROR: MONICA GOMEZ JONES JUROR NO: P-05-7 (98)

OCCUPATION: CUSTOMER SERVICE REP 701167299

SPOUSE OCCUPATION: MISD HVAC DEPT COUNTY: Midland

SELECTED/SERVING ___ CHALLENGED ___
EXCUSED ___ OTHER ___

---

34) JUROR: VANESSA M PATTERSON JUROR NO: P-05-7 (73)

OCCUPATION: CASHIER 701170947

SPOUSE OCCUPATION: NA COUNTY: Midland

SELECTED/SERVING ___ CHALLENGED ___
EXCUSED ___ OTHER ___

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35) JUROR: OFELIA B SANCHEZ — JUROR NO: P-05-7 (188)

OCCUPATION: COSMETOLOGIST — 701172876

SPOUSE OCCUPATION: STEEL WORKER REP — COUNTY: Ector

SELECTED/SERVING ___ CHALLENGED ___
EXCUSED ___ OTHER ___

~~36) JUROR: PAULA B BYNUM — JUROR NO: P-05-7 (163)~~

~~OCCUPATION: PETSMART MANAGER — 701161758~~

~~SPOUSE OCCUPATION: NA — COUNTY: Midland [Cause]~~

~~SELECTED/SERVING ___ CHALLENGED ___
EXCUSED ___ OTHER ___~~

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37) JUROR: LAURA J CARTER — JUROR NO: P-05-7 (147)

OCCUPATION: HOMEMAKER — 701162073

SPOUSE OCCUPATION: OWNER RETAIL FURNITURE — COUNTY: Midland

SELECTED/SERVING ___ CHALLENGED ___
EXCUSED ___ OTHER ___

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38) JUROR: PAUL M LOPEZ — JUROR NO: P-05-7 (199)

OCCUPATION: STUDENT — 701168313

SPOUSE OCCUPATION: NA — COUNTY: Ector

SELECTED/SERVING ___ CHALLENGED ___
EXCUSED ___ OTHER ___

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39) JUROR: COURTNEY MULLINIX JUROR NO: P-05-7 (166)

OCCUPATION: SALES ASSOC

701170062

SPOUSE OCCUPATION: SINGLE

COUNTY: Midland

SELECTED/SERVING ___ CHALLENGED ___
EXCUSED ___ OTHER ___

---

40) JUROR: TOMMY E SMITH JUROR NO: P-05-7 (62)

OCCUPATION: MACHINIST

701173608

SPOUSE OCCUPATION: NA

COUNTY: Midland

SELECTED/SERVING ___ CHALLENGED ___
EXCUSED ___ OTHER ___

---

41) JUROR: PATRICIA E JONES JUROR NO: P-05-7 (154)

OCCUPATION: OFFICE COORDINATOR

701167302

SPOUSE OCCUPATION: RESPIRATORY THERAPIST

COUNTY: Ector

SELECTED/SERVING ___ CHALLENGED ___
EXCUSED ___ OTHER ___

---

42) JUROR: ROGER O CRAMER — JUROR NO: P-05-7 (179)

OCCUPATION: SALES REPRESENTATIVE — 701162889

SPOUSE OCCUPATION: NA — COUNTY: Midland

SELECTED/SERVING ___ CHALLENGED ___
EXCUSED ___ OTHER ___

---

43) JUROR: FERNANDO SANCHEZ — JUROR NO: P-05-7 (186)

OCCUPATION: MAINTENANCE — 701172840

SPOUSE OCCUPATION: STUDENT — COUNTY: Midland

SELECTED/SERVING ___ CHALLENGED ___
EXCUSED ___ OTHER ___

---

44) JUROR: KRISTIN J PEREZ — JUROR NO: P-05-7 (176)

OCCUPATION: CLERK — 701173932

SPOUSE OCCUPATION: NA — COUNTY: Midland

SELECTED/SERVING ___ CHALLENGED ___
EXCUSED ___ OTHER ___

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF TEXAS
MIDLAND DIVISION

UNITED STATES OF AMERICA	§	
	§	CRIMINAL NO:
v.	§	MO:04-CR-67(,4)-RAJ
	§	
Jaime Duran Flores (4)	§	

GOVERNMENT'S
PEREMPTORY CHALLENGES

(Filed Jun. 7, 2004)

1	Maria Mondragon 6	4	Lee Catalano 18
2	Adrian Zarate 22	5	Cynthia Byer 10
3	James Jolly 29	6	Pascual Urias 28

ALTERNATE

1	Heidi Scott 19	2	

/s/ Jeff Pamar
Assistant U.S. Attorney

App. 37

FILED
JUN 07 2004
CLERK, U.S. DISTRICT COURT
WESTERN DISTRICT OF TEXAS
BY
DEPUTY CLERK

6-14-04
@ 8:30am

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF TEXAS
MIDLAND DIVISION

UNITED STATES OF AMERICA	§	
	§	CRIMINAL NO:
v.	§	MO:04-CR-67(4)-RAJ
	§	

Jaime Duran Flores (4)

JURY SEATING ARRANGEMENT

ALT #2 Monica Jones	12 Roger Bulman	11 Erica Smith	10 Sharman Adkins	9 Jennifer Brayton	8 Jeffrey Stephens	7 Jerry Hallmark
ALT #1 David Shuck	6 Barbara Moore	5 Tammie Stephens	4 Cassandra Lyons	3 Gregory Burnett	2 Christopher Mueller	1 Laura Long

59

100

(2)

Supreme Court, U.S.
FILED

FEB 11 2009

OFFICE OF THE CLERK

No. 08-750

In the Supreme Court of the United States

JAIME DURAN FLORES, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

EDWIN S. KNEEDLER
Acting Solicitor General
Counsel of Record

RITA M. GLAVIN
Acting Assistant Attorney General

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Department of Justice
Washington, D.C. 20530-0001
(202) 514-2217

QUESTION PRESENTED

Whether the court of appeals properly declined to address a claim under *Batson* v. *Kentucky*, 476 U.S. 79 (1986), where petitioner failed to assert that claim in the district court and the government therefore had no occasion to provide a race-neutral explanation for its peremptory challenges.

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In the Supreme Court of the United States

No. 08-750

JAIME DURAN FLORES, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINION BELOW

The per curiam opinion of the court of appeals (Pet. App. 1-19) is not published in the *Federal Reporter* but is reprinted in 286 Fed. Appx. 206.

JURISDICTION

The judgment of the court of appeals was entered on August 7, 2008. A petition for rehearing was denied on September 9, 2008 (Pet. App. 21-22). The petition for a writ of certiorari was filed on December 8, 2008. The jurisdiction of this Court is invoked under 28 U.S.C. 1259(3).

STATEMENT

After a jury trial in the United States District Court for the Western District of Texas, petitioner was convicted of being a felon in possession of a firearm, in vio-

lation of 18 U.S.C. 922(g)(1). He was sentenced to 86 months of imprisonment, to be followed by three years of supervised release. The court of appeals affirmed in a non-precedential, per curiam opinion. Pet. App. 1-19.

1. The evidence at trial showed that two individuals stole a firearm and then traded it to Manuel Antonio Mata in exchange for a quantity of heroin. During the exchange, Mata placed a call from his cell phone to the number of petitioner's common-law wife and spoke to an individual in Spanish. Pet. App. 2-3. A police investigator later interviewed Mata about the theft and asked him to help retrieve the gun. In response to that request, Mata made another cell phone call to the number of petitioner's common-law wife, again speaking in Spanish. Immediately after the call, Mata went with two other officers to an apartment complex located one and a half blocks from petitioner's home. In a dumpster behind the complex, police recovered the stolen gun in a Toys 'R' Us bag. *Id.* at 3-4.

When petitioner was arrested, he provided as his phone number the number of his common-law wife. The Toys 'R' Us bag in which the gun was found contained a receipt marked with a time and date corresponding to the time and date of surveillance footage showing petitioner making a purchase at a Toys 'R' Us store. Pet. App. 4-5.

2. A grand jury sitting in the Western District of Texas returned an indictment charging petitioner with one count of possession of a firearm after having been convicted of a felony, in violation of 18 U.S.C. 922(g)(1). Pet. App. 2. Petitioner proceeded to trial, and the jury found him guilty. *Id.* at 6.

3. On appeal, petitioner contended, among other things, that the government had violated the Equal Pro-

tection Clause as interpreted in *Batson* v. *Kentucky*, 476 U.S. 79 (1986), by using its peremptory challenges to strike three prospective jurors with Hispanic surnames. The court of appeals held that petitioner had waived that argument as a result of his failure to raise it during jury selection. Pet. App. 7-8. The court explained that "a timely objection is an essential prerequisite to a *Batson* claim," and therefore "a defendant is not entitled to raise a *Batson* claim on appeal if he did not object to the prosecutor's use of peremptory challenges in the district court." *Id.* at 7 (quoting *United States* v. *Pofahl*, 990 F.2d 1456, 1465 (5th Cir.), cert. denied, 510 U.S. 898 and 510 U.S. 996 (1993)). The court therefore declined "to address this claim raised for the first time on appeal." *Id.* at 8.

ARGUMENT

Petitioner contends (Pet. 9-16) that the court of appeals erred in holding that he waived his *Batson* claim by failing to raise it in the district court. He argues that, instead of treating the claim as waived, the court should have deemed the challenge forfeited, reviewed it under the plain-error standard of Federal Rule of Criminal Procedure 52(b), and concluded that the exclusion of certain panel members constituted plain error requiring reversal of his conviction. That contention lacks merit and does not warrant this Court's review.

1. Under *Batson* v. *Kentucky*, 476 U.S. 79 (1986), the use of peremptory challenges to exclude persons from a petit jury based on their race or gender violates the Equal Protection Clause. *Id.* at 84. "A defendant's *Batson* challenge to a peremptory strike requires a three-step inquiry." *Rice* v. *Collins*, 546 U.S. 333, 338 (2006). First, when the defendant asserts a *Batson*

claim during jury selection, he has the burden of establishing a *prima facie* case of intentional discrimination by showing that he is a member of a cognizable group, that the group's members have been excluded from the defendant's jury, and that the circumstances raise an inference that the exclusion was based on race. See *Batson*, 476 U.S. at 96. Second, if the defendant makes that showing, the government must offer a facially race-neutral explanation for its peremptory challenge. See *Purkett* v. *Elem*, 514 U.S. 765, 767 (1995) (per curiam). Third, the district court must determine whether the explanation is indeed facially race-neutral and credible. See *id.* at 768-769. Where the defendant succeeds in establishing a *prima facie Batson* claim, "the decisive question will be whether counsel's race-neutral explanation for a peremptory challenge should be believed." *Hernandez* v. *New York*, 500 U.S. 352, 365 (1991) (plurality opinion). The credibility of the explanation is a "pure issue of fact." *Id.* at 364. The trial court's findings on that issue will not be disturbed absent "exceptional circumstances," because "the best evidence" on credibility "often will be the demeanor of the attorney who exercises the challenge," and "evaluation of the prosecutor's state of mind based on demeanor and credibility lies 'peculiarly within a trial judge's province.'" *Id.* at 365-366 (quoting *Wainwright* v. *Witt*, 469 U.S. 412, 428 (1984)). For those reasons, "the trial court has a pivotal role in evaluating *Batson* claims." *Synder* v. *Louisiana*, 128 S. Ct. 1203, 1208 (2008).

2. a. The court of appeals correctly declined to address petitioner's *Batson* argument on the merits. Because petitioner did not raise an objection at the appropriate time in the district court, the government had no cause to provide a race-neutral explanation for its chal-

lenges and did not do so. The district court, in turn, could not perform its "pivotal role," *Snyder*, 128 S. Ct. at 1208, by evaluating the credibility of the prosecutor's reasons and making factual findings about whether the challenges were racially motivated. As a result, when petitioner raised the claim for the first time on appeal, the court of appeals lacked any record on the matter to review. The court was in no position to speculate how the prosecutor might have responded were he called upon to proffer a race-neutral justification for the strikes, nor could the court plumb the state of mind of the prosecutor based on such factors as his "demeanor and credibility." *Hernandez*, 500 U.S. at 365 (plurality opinion).

Petitioner's failure to raise the issue therefore deprived the court of appeals of the record necessary to determine whether a *Batson* violation occurred. In these circumstances, the court of appeals properly deemed petitioner's *Batson* challenge waived. See *James* v. *Bowersox*, 187 F.3d 866, 869 n.4 (8th Cir. 1999), cert. denied, 528 U.S. 1143 (2000); *Morning* v. *Zapata Protein (USA), Inc.*, 128 F.3d 213, 216 (4th Cir. 1997); *United States* v. *Pofahl*, 990 F.2d 1456, 1465 (5th Cir.), cert. denied, 510 U.S. 898, and 510 U.S. 996 (1993); *United States* v. *Cashwell*, 950 F.2d 699, 704 (11th Cir. 1992); cf. *Ford* v. *Georgia*, 498 U.S. 411, 422 (1991) (recognizing as "sensible" a rule deeming *Batson* challenges untimely and thus procedurally defaulted unless raised "not only before trial, but in the period between the selection of the jurors and the administration of their oaths").

b. Petitioner is incorrect in contending that the court of appeals should have reviewed his *Batson* claim under the plain-error standard of Federal Rule of

Criminal Procedure 52(b). To support that contention, petitioner seeks to analogize a *Batson* violation to other errors subject to plain-error review. See Pet. 16-17 (citing decisions applying plain-error review to a district court's failure to advise a defendant at a guilty plea proceeding of his right to be represented by counsel at trial, *United States* v. *Vonn*, 535 U.S. 55, 74-76 (2002); the presence of alternate jurors during deliberations, *United States* v. *Olano*, 507 U.S. 725, 740 (1993); or improper prosecutorial comment during closing argument, *United States* v. *Young*, 470 U.S. 1, 20 (1985)). In each of those situations, however, an appellate court has a record from which it can determine whether the alleged error occurred and whether that error satisfies the other elements of the plain-error standard—*i.e.*, whether it is "clear" or "obvious," implicates substantial rights, and "seriously affect[s] the fairness, integrity, or public reputation of the judicial proceedings." See *Olano*, 507 U.S. at 732-735 (brackets in original) (quoting *Young*, 470 U.S. at 15). That is not true in the *Batson* context. Without a record containing the government's race-neutral explanation for its challenges or the district court's assessment of those explanations, a defendant cannot make even the threshold showing of error, let alone establish that any error was plain. The failure to object on *Batson* grounds during jury selection thus more closely resembles the failure to file a pretrial motion to suppress, which similarly deprives an appellate court of a record sufficient to conduct meaningful review and is treated as a waiver partly for that reason. See Fed. R. Crim. P. 12(e); *United States* v. *Brooks*, 438 F.3d 1231, 1239-1240 (10th Cir. 2006); *United States* v. *Chavez-Valencia*, 116 F.3d 127, 132 (5th Cir.) (noting that plain-error review is inappropri-

ate in these circumstances because, *inter alia*, "on appeal the government will be forced to rely on an underdeveloped record in defending itself"), cert. denied, 522 U.S. 926 (1997).

In any event, even if petitioner were correct that plain-error review applied, he would not be entitled to relief under that standard. Petitioner contends that jury selection in this case "demonstrate[d] a pattern of discrimination evidencing a strong inference of the use of peremptory challenges based on race." Pet. 11. He then argues that the government "could not possibly proffer race-neutral bases" for the challenges and that any effort to do so "would be rejected as a matter of law." *Ibid.* But the credibility of the government's explanations is a "pure issue of fact," not one of law, and such explanations may rest on any number of factors that a paper record would not illuminate. *Hernandez*, 500 U.S. at 364. Thus, in deciding whether to exercise a peremptory challenge on a particular prospective juror, a prosecutor may properly rely not only on the substance of the juror's answers during voir dire but also on the prosecutor's impression of the juror's veracity, concentration, seriousness, temperament, and personality as reflected by such factors as the juror's body language, facial expressions, and manner of speaking. As this Court recognized in *Snyder*, 128 S. Ct. at 1208, "race-neutral reasons for peremptory challenges often invoke a juror's demeanor (*e.g.*, nervousness, inattention)." See *Rice*, 546 U.S. at 339-342 (on habeas review, upholding peremptory challenge based in part on juror's "eye rolling"). There is no basis to conclude that the government's explanations in this case would have been inherently invalid or unbelievable. Petitioner should not be permitted, moreover, to deprive the gov-

ernment of an opportunity to explain its peremptory challenges and then to seize on the absence of any evidence in the record justifying those challenges as grounds for reversal of his conviction. That result, far more than a decision that petitioner waived his *Batson* challenge by failing to raise it in a timely manner, would "undermine public confidence in the fairness of our system of justice." *Johnson* v. *California*, 545 U.S. 162, 172 (2005).

c. Because petitioner cannot demonstrate plain error in any event, this case does not squarely present the need to resolve any split of authority on the standard of review applicable to unpreserved *Batson* challenges. Contrary to petitioner's contention (Pet. at 7-8), while several circuits have reviewed *Batson* claims not raised below for plain error, no decision from another circuit would dictate a different result in the circumstances here. Where, as here, the failure to assert a *Batson* claim during jury selection results in a record that is silent on discriminatory intent, the courts that review for plain error have uniformly and summarily rejected *Batson* arguments on appeal. See, *e.g.*, *Hidalgo* v. *Fagen, Inc.*, 206 F.3d 1013, 1019-1020 (10th Cir. 2000); *United States* v. *Bedonie*, 913 F.2d 782, 794-795 (10th Cir. 1990), cert denied, 501 U.S. 1253 (1991); *United States* v. *Dobynes*, 905 F.2d 1192, 1196-1197 (8th Cir.), cert. denied, 498 U.S. 877 (1990); *Government of Virgin Islands* v. *Forte*, 806 F.2d 73, 76-77 (3d Cir. 1986). Most of the cases petitioner cites, moreover, involve the readily distinguishable situation in which the prosecution offered a race-neutral explanation for its peremptory challenges in the district court despite the defendant's failure to press the issue, and the record therefore contains at least some basis for appellate review. Even in

those circumstances, however, courts of appeals have uniformly rejected *Batson* challenges on plain-error review. See *United States* v. *Brown*, 352 F.3d 654, 662-663 (2d Cir. 2003);[1] *United States* v. *Parsee*, 178 F.3d 374, 378 (5th Cir.), cert. denied, 528 U.S. 988 (1999); *United States* v. *Contreras-Contreras*, 83 F.3d 1103, 1105 (9th Cir.), cert. denied, 519 U.S. 903 (1996); *United States* v. *Chandler*, 12 F.3d 1427, 1432 (7th Cir. 1994); *United States* v. *Pulgarin*, 955 F.2d 1, 2 (1st Cir. 1992); *cf. United States* v. *Willis*, 523 F.3d 762, 767-768 (7th Cir. 2008) (treating claim as "preserve[d]" in light of the government's race-neutral justification, proffered during colloquy mentioning *Batson*).[2] In this context, therefore, the difference between treating an unpreserved *Batson* challenge as waived and treating it as forfeited will rarely, if ever, prove consequential, and this Court's review of that issue is unnecessary.

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[1] Because the government agreed that plain-error review was "proper," the court in *Brown* did not determine whether plain error review applies in *Batson* cases, although it suggested in dicta that a forfeited *Batson* claim is not waived. 352 F.3d at 663.

[2] Petitioner also relies on a number of state decisions (Pet. 8-9 n.4), but in all but one of those cases, the defendant raised a *Batson* claim in the trial court. See *State* v. *Were*, 890 N.E.2d 263, 278-279 (Ohio), cert. denied, 129 S. Ct. 606 (2008); *McGee* v. *State*, 953 So. 2d 211, 214 (Miss. 2007); *State* v. *Nordlund*, No. 26859-1-II, 2000 WL 31081997, at *3 (Wash. Ct. App. Sept. 13, 2002); *Hurts* v. *Woodis*, 676 So. 2d 1166, 1172-1173 (La. Ct. App. 1996). In the remaining state case, *Rodriguez* v. *Weber*, 617 N.W.2d 132 (S.D. 2000), the court reviewed for plain error a *Batson* claim raised for the first time on appeal, concluding that the defendant's evidence for believing that the prosecutor had "a discriminatory state of mind" was unpersuasive. *Id.* at 141. Petitioner cites no case, federal or state, in which an appellate court has upheld an unpreserved *Batson* claim in the absence of a record containing the prosecutor's race-neutral explanation for his challenges.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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In The

Supreme Court of the United States

JAIME DURAN FLORES,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Fifth Circuit

REPLY BRIEF FOR THE PETITIONER

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REPLY BRIEF FOR THE PETITIONER

In its opposition, the Government concedes that the circuit courts of appeal are split on the question presented: whether a *Batson* claim first raised on appeal is reviewable under the plain error standard, or whether the claim is waived and unreviewable. Rather than explain why resolution of the split is not worthy of this Court's attention, the Government argues that certiorari should be denied because the petitioner could not win under the plain error standard. That argument, though, goes to the merits of petitioner's *Batson* challenge, rather than what should be the proper standard of review.

As shown in the petition and below, the majority of circuit courts properly have held that Rule 52(b)'s plain error standard should apply, and the Government has, in fact, taken that position in other cases. Moreover, claimants such as Mr. Flores can prevail under that standard where, as here, the Government has struck all panel members of the minority defendant's race and there were no answers given during voir dire to differentiate minority and non-minority panel members. Under these circumstances, the Government could never proffer non-verbal, race-neutral bases for striking all minority panel members with a chance of being empanelled. Accordingly, Mr. Flores can prevail on his *Batson* challenge under this "empty" record, and, more importantly, certiorari is warranted to resolve the split among the circuit courts, state courts, and the Government itself.

1. a. The Government hardly addresses petitioner's reason for seeking certiorari: to resolve a circuit split on whether a *Batson* claim may be reviewed under Rule 52(b). The Government does not dispute that the Fifth Circuit's decision here (as well as similar holdings of three other circuit courts) conflicts with the holdings of seven circuit courts. Instead, the Government argues that the Fifth Circuit's holding that such a claim is unreviewable on appeal is correct, without addressing why certiorari is unwarranted to resolve the split.

A minority defendant's ability to preserve important constitutional rights to a fair jury trial – and not having all members of his same race removed via peremptory challenges – should not vary on the happenstance of where his trial occurs. It is not the case, as the Government argues, that treating an unpreserved *Batson* challenge as waived "will rarely, if ever, prove consequential." BIO at 9. It certainly has consequences for Mr. Flores, the disproportionately large number of Hispanic defendants in the Fifth Circuit and elsewhere, and the public's perception of the judicial process. This Court should take the opportunity to set a proper national standard for the review of *Batson* claims where appointed trial counsel fails to raise plain error.[1]

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[1] The Court can also take this opportunity to resolve a split among the state courts. The Government argues that the factual scenarios in the cases cited by petitioner are inapposite, but those are differences that make no difference to the issue of

(Continued on following page)

b. Plain error properly applies to unpreserved *Batson* claims. Because a minority defendant's *Batson* rights arise under the constitution, it is especially important that courts zealously protect opportunities to vindicate those rights. *See United States v. Frady*, 456 U.S. 152, 163 (1982) (holding that the plain error standard was "intended to afford a means for the prompt redress of miscarriages of justice"). As demonstrated in the petition (at 16-17), this Court has found plain error applicable in cases involving a number of errors less significant than the *Batson* rights at issue here. In cases involving constitutional rights, federal courts have generally been more willing to apply the plain error standard, and, in fact, have indicated that this standard is applied "less rigidly when reviewing a potential constitutional error." *See United States v. Handakas*, 286 F.3d 92, 111 (2d Cir. 2002) (quoting *United States v. Easter*, 981 F.2d 1549, 1557 (10th Cir. 1992)). Indeed, there is no principled reason, and the Government has not presented one, for denying plain error review for *Batson* claims. As shown in the petition, minority defendants such as Mr. Flores can prove each element of Rule 52(b), and can prove a *Batson* violation on the face of the record.

The Government makes light of the decisions of the majority of circuit courts applying the plain error

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granting certiorari. The fact remains that some state courts allow plain error review and others preclude it. Certiorari is warranted to unify federal and state courts' treatment of *Batson* claims under the plain error standard.

standard, arguing that plain error review was appropriate in those cases only because there were race-neutral bases apparent on the face of the record justifying the Government's strikes. BIO at 6. Notably, nowhere do those courts of appeal state that they are reviewing under the plain error standard for that reason. Instead, those courts only go through the exercise of examining the record once they already had determined that plain error review applied. After a review of the record, some of those courts found that the Government could point to race-neutral bases for striking the minority jurors. Thus, the minority defendants lost in some of those cases, but at least they were afforded review on the merits, unlike Mr. Flores.

Here, the fact that the Government cannot point to race-neutral bases in the record should not militate in favor of denying review. The opposite should be true: plain error review is especially warranted, and the minority defendant should be able to prevail, when there is a complete record of voir dire and nowhere is there any verbal responses from minority panel members to differentiate them from non-minority panel members. Under such an "empty" record, the Government cannot, as a matter of law, justify striking all members of the minority defendant's race who have a chance of being empanelled.

2. a. Even though the Court's focus should be on what standard applies – rather than whether petitioner could meet that standard – petitioner could prevail on his *Batson* challenge.

The Government does not challenge that two of the three elements of Rule 52(b) are met: that Fourteenth Amendment-conferred *Batson* rights are substantial, and that a violation of *Batson* affects the fairness, integrity, or public reputation of judicial proceedings. That leaves only the question of whether there was plain error.

As to that issue, the Government has not challenged the *prima facie* elements of a *Batson* challenge: Mr. Flores is a member of a cognizable racial group, the Government used peremptory challenges to remove panel members of his race, and other relevant circumstances to raise an inference that peremptory challenges were used to exclude panel members based on race. *See* petition at 10-11. The Government also does not challenge that Mr. Flores can demonstrate that both he and panel members can be identified as Hispanic by using census bureau data on Hispanic surnames. *Id.* at 12-14.

b. Having all but conceded those issues, the Government focuses its argument on the fact that, because appointed trial counsel did not object to the exclusion of Hispanic jurors, the Government was never made to proffer race-neutral bases for its strikes. Notably, the Government does not direct this Court to any race-neutral bases for its strike of the Hispanic panel members, as was done in the seven courts of appeal cases utilizing plain error review. And the fact that the Government or the Court did not have a chance to address the perceived error after a contemporaneous objection should not mean that

the issue is unreviewable; if that were true, then Rule 52(b) – which applies *only* when error is *not* presented to the trial court – would be rendered superfluous.

But, more importantly, the case law demonstrates that the Government cannot, as a matter of law, proffer race-neutral bases for striking every minority juror when those minority jurors answer questions during voir dire consistently with non-minority jurors. *See, e.g., Snyder v. Louisiana*, 128 S. Ct. 1203 (2008) (rejecting race-neutral bases when excluded African-American juror answered questions consistently with white jurors); *Miller-El v. Dretke*, 545 U.S. 231 (2005) (rejecting race-neutral bases when 91% of African-American jurors excluded); *Montiel v. City of Los Angeles*, 2 F.3d 335, 340 (9th Cir. 1993) (rejecting race-neutral bases when "all jurors with Spanish surnames were peremptorily struck from the panel"). In other words, when there is nothing in the record that would differentiate minority and non-minority jurors, there is nothing the Government possibly could have said (*e.g.*, non-verbal clues, appearance, gut feeling, *etc.*) that could serve as race-neutral bases to justify striking all three Hispanic panel members with a mathematical chance of being empanelled.

c. With the record providing no race-neutral bases for striking all Hispanic jurors, Mr. Flores can meet the plain error standard. More importantly, he should have access to meaningful appellate review. Seven circuit courts have found that Rule 52(b)

should apply in such circumstances, and there is no principled reason why it should not here. While it may be difficult to prevail under that standard in many cases, that is not a principled reason for refusing to make such review available. Certiorari is warranted to align the federal and state courts on this issue. And, indeed, it is warranted to make the Government's position consistent, as well. *See United States v. Brown*, 352 F.3d 654, 663 (2d Cir. 2003) (wherein the Government agreed that plain error review is appropriate); *United States v. Stephens*, 421 F.3d 503, 510-11 (7th Cir. 2005) (wherein the Government agreed to attempt to proffer race-neutral bases for strikes for first time on appeal).

CONCLUSION

Because of the split among the circuit courts of appeal, state appellate courts, and the Government's position, certiorari should be granted.

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